b. Individual Plainiffs' CPA Claim Against Defendants

The Individual Plaintiffs point out that, having established their WLAD action, little more is required to establish their CPA action, because a violation of the WLAD "committed in the course of trade or commerce" is a *per se* violation of the CPA where the violation causes injury to business or property. *See* RCW 49.60.030(3); *see also Panag*, 166 Wn.2d at 37. Both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in both her individual and corporate capacity. *See* RCW 19.86.010(1) ("'Person' shall include, where applicable, natural persons, corporations..."); *see also Ralph Williams' (III)*, 87 Wn.2d at 322 ("If a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties.").

The Individual Plaintiffs must establish five elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to business or property, and (5) causation." *Id.* (further citation omitted). The uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce, in particular inside the Arlene's Flowers, in Richland, Washington. *See* RCW 19.86.010(2) ("'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."). This satisfies the second element of their CPA claim. Because the Individual Plaintiffs have demonstrated a violation of the WLAD in trade or commerce, the violation is, for the purpose of applying the CPA, "a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or

injunctive context is simply whether the involvement is a service provided for a fee, in which it must be offered on a non-discriminatory basis under the WLAO.

commerce." RCW 49.60.030(3). This satisfies the first and third elements of the CPA claim.

As to the fourth and fifth element, the judicial officer previously assigned to these matters addressed this issue in a prior summary judgment motion by Defendants. As part of that judicial officer's ruling, two orders were cntered following a hearing on October 4, 2013. Both orders make clear that the Court was reviewing the facts, the Individual Plaintiffs' claimed mileage of $7.91 as cconomic damages caused by Defendants' refusal to provide services, in the light most favorable to the non-moving party. The first Order, entered on October 7, 2013, indicated that "this Court concludes that the fourth and fifth elements as required by *Hangman Ridge* are estahlished." The Amended Order, entered on December 17, 2013, makes clear that the Court was not making a finding as a matter of law regarding the establishment of elements four and five. The Amended Order removes the language above and replaces it with the following: "this Court concludes that the facts are sufficient to defeat Defendants' Motion for Partial Summary Judgment." It is therefore clear that the prior judicial officer did not, due to the nature of prior summary judgment (and lack of a cross motion), make a determination regarding the sufficiency of the claimed loss of $7.91 to establish the fourth and fifth elements of the Individual Plaintiffs' CPA claim as a matter of law.

While the supporting legal authority appears in a footnote, and the Individual Plaintiffs indicate that the "extent of Plaintiff's damage will be presented to the court at another time," they indicate they were injured by Defendants' actions and that they are seeking summary judgment on liability under the CPA claim. Because a ruling on damage and causation, the fourth and fifth element, are necessary to resolve the issuc of liability, the Court will addrcss these elements as well. Defendants do not contest in their response the assertion by the Individual Plaintiffs tbat they incurrcd costs of

$7.91 in mileage, as a result of Defendants' denial of services (which they term declining and referring) in securing alternate replacement services for their wedding. In point of fact, Defendants' characterization of Stutzman's act as a declination and referral impliedly admits that additional cost and effort would be required to secure alternate services. Under the CPA, nominal economic damages are sufficient to support standing. *Smith v. Stockdale*, 166 Wn.App. at 565 ($5 entry fee sufficient to support claim of injury to property in CPA claim); *see also Amback v. French*, 167 Wn.2d 167, 171, 216 P.3d 405 (2009) (quoting *Hangman Ridge* for proposition that injury does not need to be great or quantifiable). Simply put, if a $5 entry fee is sufficient to satisfy the element of injury to property, the greater (albeit only slightly greater) amount of $7.91 in mileage must be sufficient as a matter of law. Causation is not contested, satisfying the fifth element. On their CPA claim, Individual Plaintiffs are also entitled to summary judgment on liability.

c. *AG's CPA Claim Against Defendants*

The AG is only required to prove three elements in a CPA claim: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. Defendants, both in their Answer and in deposition testimony, assert and/or admit a course of conduct on the part of Stutzman that legally constitutes a refusal to provide services to Ingersoll on March 1, 2013, for religious reasons. *See Defendants' Answer* (13-2-00871-5), pg. 3, para. 4.4 ("....Ms. Stutzman informed Robert Ingersoll that her religious convictions precluded her from designing and creating floral arrangements to decorate a same-sex wedding"); *see also Stutzman Deposition* (....And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.).

As indicated above, the uncontested material facts establish a violation of the WLAD in trade or commerce, and thus a *per se* violation of the CPA. *See* RCW 49.60.030(3); RCW 19.86.010(2). Also, as indicated above, both Stutzman and Arlene's Flowers are liable under the CPA, with Stutzman being personally liable in both her individual and corporate capacity. *See* RCW 19.86.010(1); *see also Ralph Williams' (III)*, 87 Wn.2d at 322.

The AG makes one additional point with respect to the conduct (same sex marriage) versus status (being gay) distinction Defendants seek to make with respect to Stutzman's actions under the WLAD, which provides the predicate for the *per se* CPA claim. This is that, assuming for the purposes of argument that the Courts have allowed such a distinction (and they have not), it would make no difference regarding the Defendants' liability under the WLAD. This is because the WLAD does not require the distinction, restriction or discrimination to be the direct result of Stutzman's actions. *See* RCW 49.60.215 ("[i]t shall be an unfair practice for any person or the person's agent or employee *to commit an act which directly or indirectly results in any distinction, restriction, or discrimination*…"). The indirect discriminatory result flowing from Stutzman's actions satisfies the WLAD and constitutes a violation. On the *per se* CPA claim, the AG is entitled to summary judgment on liability.

This does not end the Court's analysis. As previously indicated, the AG pled its CPA claim in the alternative: both as a *per se* CPA violation and as a generic CPA violation. The AG moves for summary judgment on the alternative generic CPA violation as well. The elements remain the same: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *See* RCW 19.86.080(1); *see also State v. Kaiser*, 161 Wn.App. at 719. However, as

opposed to satisfying all three elements by showing a WLAD violation in trade or commerce, each element must be satisfied individually.[20]

As to the first element, while not defined in the statute, "[w]hether a particular act or practice is 'unfair or deceptive' is a question of law," to be determined by the Court. *Panag*, 166 Wn.2d at 47. The AG cites to *Blake v. Federal Way Cycle Center* which establishes criteria for determining whether an act or practice is "unfair" as follows:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy, as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers…; (3) whether it cause substantial injury to consumers…

Blake v. Federal Way Cycle Center, 40 Wn.App. 302, 310, 698 P.2d 578 (1985) (further quotation omitted); *see, e.g., Demelash v. Ross Stores, Inc.*,[21] 105 Wn.App. 508, 523-524, 20 P.3d 447 (2001) (reversing grant of summary judgment for defendant, an Ethiopian immigrant with limited English skills, where store refused to return his coat and accused Plaintiff of shoplifting even after he provided receipt, and holding that plaintiff successfully established, among others, first element of "unfair or deceptive act or practice" on prima facie basis). Even in the absence of the WLAD's declaration, the Court finds that treating a customer differently because of their membership in a protected class is unfair as a matter of law pursuant to the first listed criteria in *Blake*. Any other result would be inconsistent with Washington law. *See* RCW 26.04.010(1) (defining marriage to include same-sex couples); *see also*,

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[20] The Defendants describe these means of proof as "co-extensive," to which the AG takes exception. Whatever Defendants mean by "co-extensive," it is clear that the three elements of a CPA claim brought by the AG can be satisfied by showing a *per se* violation of a qualifying predicate statute occurring in trade or commerce, or by proving qualifying acts independent of a *per se* violation of a qualifying predicate statute.

[21] *Demelash* comes close to resolving the issue, in that in discussing the WLAD claim therein, it is clear that it is based on race and national origin as the protective classes at issue. That said, the discussion of the CPA claim makes no mention of the protective class at issue in the CPA claim. Inferentially, they have to have the same basis, but in an abundance of caution, the Court does not rely on this inference.

RCW 9A.36.078[22] (legislative finding in criminal malicious harassment statute). The first element is satisfied.

Defendants' argument that Stutzman was acting within the bounds of public policy because she and Arlene's Flowers do or should fit within the exclusions for ministers and religious organizations under RCW 26.04.010(4-6) is unconvincing. First, as the AG rightly points out, the statutes address *conduct*, not beliefs, so the fact that the law makes a distinction between her actions in a public accommodation and that of a minister or priest in a house of worship is in no way unfair. Further, Stutzman is not a minister, nor is Arlene's Flowers a religious organization when they sell flowers to the general public in trade or commerce from a public accommodation. *See* RCW 26.04.010(4). Defendants advance a construction by which the exception defeats the purpose of the rule: it also makes a trifle of the profound distinction between the clergy and the laity. This must be considered an absurd result. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012) (court to avoid absurd results in construing any statute).

The second element is also satisfied, as the uncontested material facts demonstrate that the events of March 1, 2013 occurred in trade or commerce. *See* RCW 19.86.010(2) (defining "trade" and "commerce"). As to the third element, public interest impact, the Court believes the AG reads too much in *Lightfoot v. MacDonald*, an individual CPA action, when it asserts that the case clearly establishes a presumption that the element is established when the AG acts. *Lightfoot v.*

[22] The first full paragraph of the legislative finding reads as follows: "The legislature finds that crimes and threats against persons because of their race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicaps are serious and increasing. The legislature also finds that crimes and threats are often directed against interracial couples and their children or couples of mixed religions, colors, ancestries, or national origins because of bias and bigotry against the race, color, religion, ancestry, or national origin of one person in the couple or family. The legislature finds that the state interest in preventing crimes and threats motivated by bigotry and bias goes beyond the state interest in preventing other felonies or misdemeanors such as criminal trespass, malicious mischief, assault, or other crimes that are not motivated by hatred, bigotry, and bias, and that prosecution of those other crimes inadequately protects citizens from crimes and threats motivated by bigotry and bias. Therefore, the legislature finds that protection of those citizens from threats of harm due to bias and bigotry is a compelling state interest."

MacDonald, 86 Wn.2d 331, 335, 544 P.2d 88 (1976). The Court reaches this conclusion based on the current briefing: the AG has cited no case law subsequent to *Lightfoot* that says this is what the case means. That said, the uncontested material fact of the unwritten policy to refuse to provide services to any future same-sex wedding establishes the third element as it would in an individual action, as the practice "has the capacity to injure other persons." RCW 19.86.093(3)(c). On the alternative generic CPA claim, the AG is also entitled to summary judgment on liability.

2. Preemption Of CPA And WLAD As Applied To Defendants' Conduct Under First Amendment To United States Constitution

In both actions, Defendants assert the affirmative defense of preemption under the United States Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.6 As applied preemption under the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.6. In the Individual Plaintiffs' action, the same affirmative defense is raised, but the defense is more specifically delineated:

> 32. Preemption: As applied violation of the Free Speech, Free Exercise and Free Association provisions of the First Amendment to the United States Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 32. While the Defendants have vigorously contested all aspects of these actions, their primary defense to both actions appears to be that a central tenet of Stutzman's firmly-held religious belief is in direct conflict with the Laws of the State of Washington, and that her religious beliefs should prevail. Her beliefs include both a definition of marriage that excludes same-sex marriage and an explicit rejection of same-sex marriage as a

civil right. *See* Resolution of SBC, "On 'Same-Sex Marriage' And Civil Rights Rhetoric" New Orleans – 2012. The State of Washington has declared discrimination against individuals on the basis of sexual orientation to be a menace to "the institutions and foundations of a free democratic state," and has included same-sex marriage as one of the civil rights accorded to gay and lesbian residents. *See* RCW 49.60.010 (purpose statement of WLAD); *see also* RCW 26.04.010(1) (*as amended by* Laws of Washington 2012, Ch. 3, § 1(1)); *see also* Referendum Measure 74, approved Nov. 6, 2012. Because Stutzman owns and operates a Washington State corporation that provides arranged flowers for weddings, the conflict between Stutzman's religiously motivated conduct in commerce and the law is insoluble.

a. Free Speech

Defendants argue that the act of arranging flowers is inherently artistic and expressive and thus protected speech. Stutzman asserts that, after consulting with her customers, she creates floral arrangements that are designed to communicate the couple's vision or theme for the event. Defendants have attached to their declaration materials in support of this proposition, including reference material explaining the religious significance of flower arrangement dating back to the ancient Egyptians and instructional material on flower arranging. They argue that this artistic expression is protected speech.[23] *See, e.g., Hurley v. Irish-American Gay, Lesbian And Bisexual*

[23] Stutzman also claims that other aspects of her involvement in weddings are speech, including singing, standing for the bride, clapping to celebrate the marriage, and in one instance counseling the bride. Tellingly, Stutzman does not claim that she was being paid to do any of these things. Said another way, she does not claim that these are services that she is providing for a fee to her customers such that they would be covered by an injunction. The degree to which she voluntarily involves herself in an event outside of the scope of services she must provide to all customers on a non-discriminatory basis (if she provides the service in the first instance) is not before the Court. This is not to ignore Stutzman's objection to involvement through mere presence at an event and how that presence is seen as an expressive act validating the event itself: the deposition testimony makes clear that Stutzman and Arlene's Flowers customarily provided services include preparing wedding flowers for pickup as well as delivering the flowers to the event, including set up. This same objection was considered and rejected in *Elane Photography*, where the argument of validation through involvement on the part of a wedding photographer, who must actively participate in the event to ply her trade, was even stronger. *Elane Photography*, 309 P.3d at 63-72 (N.M. 2013) (discussing Free Speech claim).

Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed.2d 487 (1995) (explaining that "a narrow, succinctly articulable message is not a condition of constitutional protection" and citing example of Jackson Pollock painting). They therefore assert that Stutzman and Arlene's Flowers cannot be compelled to "speak" through arranged flowers at a same-sex wedding.

The AG counters with *Rumsfeld*, which holds:

> it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.

Rumsfeld v. Forum For Academic & Institutional Rights, Inc., 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L. Ed.2d 156 (2006) (Congress may require law schools to provide equal access to military recruiters) (*quoting Giboney v. Empire Storage & Ice. Co*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed.2d 834 (1949)). As the Supreme Court further explained, Congress can prohibit racial discrimination in employment and:

> [t]he fact that this will require an employer to take down a sign reading "White Applicants Only" *hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.*

Id. (italics added). Because anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression of a message with which the speaker disagrees. The Defendants offer no persuasive authority in support of a free speech exception (be it creative, artistic, or otherwise) to anti-discrimination laws applied to public accommodations. *See Elane Photography*, 309 P.3d at 72 ("Even if the services it offers are creative or expressive, Elane Photography must offer its services to customers without regard for…sexual orientation…") (no violation of Free Speech when required to comply with NMHRA). The existing jurisprudence on this issue,

including the most recent and comparable case, *Elane Photography*,[24] is soundly against the Defendants.

b. Free Exercise

As indicated above, the Free Exercise Clause is not without its limits. Religious motivation does not excuse compliance with the law. *Reynolds,* 98 U.S. at 166-167 (prosecution under Utah Territory bigamy law). An individual may be made to comply with a valid and neutral law of general applicability that forbids conduct that an individual's religion requires. *Smith*, 494 U.S. at 879 (religious use of Peyote). Such laws are subject to a rational basis inquiry only, because the government's ability to prohibit socially harmful conduct "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 884-85 (further citation omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Haialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed.2d 472 (1993) (Even where it burdens religious practice "a law that is neutral and of general applicability need not be justified by a compelling government interest."). The Supreme Court has clearly stated:

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption…operates to impose [the follower's] religious faith on the [person sought to be protected by the law].

United States v. Lee, 455 U.S. at 261 (Amish employer must collect social security tax for those in their employ).

[24] In *Elane Photography*, the Court addressed and ultimately rejected in detail a Free Speech challenge including sub-challenges that New Mexico's anti-discrimination law (the NMHRA) violated the right to refrain from speaking the Government's message and that the NMHRA compelled Elane Photography to host or accommodate the message of another speaker. *Elane Photography*, 309 P.3d at 63-72.

To pass constitutional muster against a free exercise challenge, a law must be both neutral and generally applicable. Because infringement or restriction upon a religiously motivated practice (conduct) is implicit in the challenge, the focus when addressing neutrality is as follows: "if the object of a law is to infringe upon or restrict practices *because* of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533 (emphasis added). The WLAD looks to discriminatory impact and the CPA prohibits acts because of unfairness or capacity to deceive a consumer. *Lewis*, 53 Wn.App. at 208 (WLAD prohibits discriminatory impact and discriminatory motivation is irrelevant); *see also, Kaiser*, 161 Wn.App. at 719 ("To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public.") (emphasis in original). The motivation for discrimination or for unfair or deceptive conduct is limited only by the human condition, but is ultimately irrelevant. Neither the WLAD nor the CPA restrict conduct because of motivation, religious or otherwise.

"A law is not generally applicable when the government, 'in a selective manner[,] imposes[s] burdens only on conduct motivated by religious belief." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (*quoting Lukumi*, 508 U.S. at 543). For the same reasons, because the WLAD and the CPA apply to relevant conduct in reference to its effect, not the motivation of the actor, both are generally applicable. *See* RCW 49.60.010 (WLAD purpose statement), *see also Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) ("The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting" of the religious groups), *cert. denied*, 555 U.S. 815 (2008). The provisions of the WLAD and the CPA are clearly rationally related to their goals of eliminating discrimination and preventing unfair or

deceptive practices in commerce. *Compare* RCW 49.60.010 (WLAD purpose statement), *with* RCW 49.60.215(1) (WLAD prohibitions creating right of action); *and compare* RCW 19.86.920 (CPA purpose statement), *with* RCW 19.86.020, 080(1) and .093 (CPA prohibitions creating right of action for AG and Individual Plaintiffs respectively). The argument to the contrary is foreclosed by *Burwell*, where, Justice Scalia, writing for the majority, found that the interest of combatting discrimination in the area of race to meet an even higher level of scrutiny as follows:

> [t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post*, at 2804-2805. Our decision today provides no such shield. *The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.*

Burwell v. Hobby Lobby Stores, Inc., __ U.S. __, 134 S. Ct. 2751, 2783, 189 L. Ed.2d 675 (2014) (italics added). This is the latest in a long line of cases that found the eradication of discrimination to be a compelling state interest. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 95 L. Ed.2d 474 (1987) (finding state public accommodation laws that combat gender discrimination serve "compelling interest of the highest order.") (internal quotation and citation omitted).

Defendants' argument that the WLAD is not neutral or generally applicable because it is "riddled" with religious exemptions and because marriage laws contain an exemption for ministers and religious organizations with respect to same sex marriage is unconvincing. RCW 26.04.010(4) and (5) simply say a minister does not have perform a same sex wedding, nor does a religious organization have to host one. RCW 26.04.010(4) and (5). It does not say that ministers or religious organizations are, if they get a business license and run a public accommodation, are immune from the WLAD. The WLAD exempts a "bone fide religious or sectarian institution" when

it runs an "educational facility," but not a flower shop. RCW 49.60.040(2). These exemptions for the clergy and religious organizations are required, and the WLAD remains neutral and generally applicable with them. *See Elane Photography*, 309 P.3d at 74-75 (rejecting same argument); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. __, 132 S. Ct. 694, 181 L. Ed.2d 650 (2012) (Religious organizations exempt from some anti-discrimination laws so that they may choose own leaders). The same is true of other exceptions, simply by way of example, the fact that colleges may designate dorms for members of one sex only do not show hostility to or targeting of religiously motivate conduct. *See* RCW 49.60.222(3); *see also Elane Photography*, 309 P.3d at 74-75. Defendant again mixes the distinction between belief and conduct, clergy and laity, and the distinction between accommodation and public accommodation, and as a result cites to cases that are distinguishable on their facts.

c. Free Association

The result is no different if the asserted interest is freedom of association. Even in private organizations:

> [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Hishon v. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed.2d 59 (1984) (*quoting Norwood v. Harrison*, 413 U.S. 455, 470, 93 S. Ct. 2804, 37 L. Ed.2d 723 (1973)).

d. Hybrid Right

Where a neutral and generally applicable law applies not only to the Free Exercise Clause, but also to other constitutional protections, such as freedom of

speech, a "hybrid rights" claim is presented, and any sucb law must satisfy strict scrutiny. *See Smith*, 494 U.S. at 881 (*citing Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed.2d 1292 (1943) (invalidating flat tax on solicitation as applied to the dissemination of religious ideas)). Just as no such claim was raised in *Smith*, there is no such claim here. The WLAD in combination with the CPA does not compel Stutzman or Arlene's Flowers to offer any goods or services, expressive or otherwise in trade or commerce, it simply requires that any services provided to one from a public accommodation he provided to all. As the Court observed in *Smith*:

> [o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.

Smith, 494 U.S. at 882 (*quoting Gillette v. United States*, 401 U.S. 437, 461, 91 S. Ct. 828, 28 L. Ed.2d 168 (1971)). For a free exercise claim to be subject to strict scrutiny on a "hybrid rights" claim, the proponent must show "a likelihood...of success on the merits" of the free speech claim. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). As indicated above, this tbe Defendants have not done, the cases they cite are distinguishable: they do not deal with public accommodations or for the two public accommodation (albeit non-profit) cases cited, they are distinguishable on their facts. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed.2d 554 (2000) (New Jersey could not force group to admit members they did not desire (gay members) to join group); *see also Hurley*, 515 U.S. at 566 (State could not force parade organizers to include gay-rights organization in parade but could not prevent gays or lesbians from marching in parade). Further, both cases are distinguished by the later decided cases of *Rumsfeld*[25] and *Martinez*.[26]

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[25] *See Rumsfeld*, 547 U.S. at 69 (Holding that Congress may require law schools to provide equal access to military recruiters and distinguishing *Dale* as an instance where the State was forcing Defendants "to accept members they did not desire.")

However, as indicated below, even if strict scrutiny applied to their First Amendment claim, the WLAD and CPA would survive. None of the claims in these two actions offend free speech, free exercise or free association under the First Amendment to the United States Constitution, and thus the Defendants' affirmative defense fails as a matter of law.

3. Violation Of Article I, Section 11 and Section 5 of Washingtoo State Constitution As Applied To Defendaots' Conduct Through Application of CPA And WLAD

Also both actions, Defendants assert as an affirmative defense that the claims violate the Washington Constitution. In the Answer to the AG's action, the affirmative defense is listed as follows:

> 6.7 As applied violation of Article I Section 11of the Washington State Constitution.

Defendants' Answer (13-2-00871-5) (AG Action), pg. 6, para. 6.7. In the Individual Plaintiffs' action, the affirmative defense is raised, but the defense includes two claims:

> 33. Justification: As applied violation of Article I Section 11 and Article I, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33.

a. Free Exercise

While Article I, Section 11 provides broader protection than the First Amendment, it also is not without its limits. *City of Woodinville*, 166 Wn.2d at 642. As the AG and Individual Plaintiffs observe, the distinction between freedom to

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[26] *Martinez*, 561 U.S. at 689 (University student group's claim that it did not prohibit gay members, only those who engaged in or supported same-sex intimacy rejected because prior decisions "have declined to distinguish between status and conduct in this context.").

believe, which is ahsolute, and the freedom to act, which is not, is clear in the text of the Washington State Constitution itself:

> [a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; *but the liberty of conscience hereby secured shall not be so construed to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*

Wash. Const. Article 1, Section 11 (italics added). Without explanation, the Defendants fail to include the complete text, stopping at the word "worship." Unlike religious belief, religiously motivated action (conduct) is subject to limitations when the state acts pursuant to its police power. When the state acts pursuant to its police power to prohibit conduct it deems harmful to its citizens, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[27] *Balzer*, 91 Wn.App. at 60-61 (*citing State v. Smith*, 93 Wn.2d 329, 338, 610 P.2d 869 (1980)).

A party challenging government action must show both a sincere belief and a substantial burden upon free exercise as a result of the government action. *City of Woodinville*, 166 Wn.2d at 642-43. The AG and Individual Plaintiffs do not contest that Stutzman has a sincerely-held religious belief, nor could they: the doctrinal statement of her church is clearly delineated in the record, her actions are entirely consistent therewith, and the Court should not inquire further in the matter. *See Backlund*, 106 Wn.2d at 640 ("Courts have nothing to do with determining the reasonableness of belief."). They argue in the alternative that the application of the WLAD and CPA to her conduct does not constitute a substantial burden on her exercise of religion, or if a substantial burden exists, the WLAD and the CPA are "a

[27] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

narrow means for achieving [Washington's] compelling goal" of eradicating discrimination in public accommodations. *City of Woodinville*, 166 Wn.2d at 642-43.

All burdens are evaluated "in the context in which [they arise]" which "necessarily encompasses impact on others." *Id.* at 644 (healing the sick may be connected to worship but "a church must still comply with reasonable permitting process if it wants to operate a hospital or clinic."). "[T]he key question is not whether a religious practice is inhibited, but whether a religious tenet can still be observed." *State v. Motherwell*, 114 Wn.2d 353, 362-63, 788 P.2d 1066 (1990) (non-clergy counselors required to report suspected child abuse); *see also Backlund*, 106 Wn.2d 632 (hospital may require physician to purchase professional liability insurance despite his religious objection). As the Court observed in *Backlund*:

> Dr. Backlund freely chose to enter the profession of medicine. *Those who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity.*

Backlund, 106 Wn.2d at 648 (italics added).

While the AG argues that neither the WLAD nor the CPA constitute substantial burdens upon Stutzman's exercise of her religion, given that she could simply have an employee perform the task, in light of *Burwell*, which supports proposition that a closely-held corporation can raise the free exercise claim, and *Backlund*, which assumes that a substantial burden exists when the exercise of a licensed profession is contingent on compliance with a rule requiring specific conduct, the Court will assume for the purposes of analysis that a substantial burden exists and the proposed alternative is not one Stutzman must avail herself of because her closely-held corporation may also advance her free exercise rights. *See Burwell*, 134 S. Ct. at 2769-2772 (business practices compelled or limited by tenets of a religious doctrine

fall within the understanding of the "free exercise of religion" under *Smith*);[28] *see also Backlund*, 106 Wn.2d at 647 ("Further, the facts demonstrate that the bylaw's purpose could not be achieved by any less drastic restriction of Dr. Backlund's First Amendment Rights.").[29] That said, the AG and the Individual Plaintiffs make a compelling case that the choice either to operate one's private business in a way inconsistent with one's religious beliefs, or forego 3% of gross profits is not the sort of "gross financial burden" that violates free exercise. *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Board*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996) (historic landmark designation would reduce value of church property by half). Without the implication of a substantial burden in *Backlund*, the AG and the Individual Plaintiffs would prevail on this point, and *Backlund* is not without its challenges in interpretation, given that First Amendment and Article I, Section 11 are analyzed in the same manner therein.

Even assuming a substantial burden, the AG and the Individual Plaintiffs are correct that the compelling interest test is met. Compelling interests are "those governmental objectives based upon the necessities of national or community life such as threats to public health, peace, and welfare." *Balzer*, 91 Wn.App. at 56 (*citing Munns v. Martin*, 131 Wn.2d 192, 200 (1997)). The Defendants' claim that "combatting discrimination" is too broad an interest to be compelling. The Defendants are incorrect. The State's compelling interest in combatting

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[28] The AG points out that Article I, Section 11 guarantees its protections to "every individual," but not to corporations, and that the Defendants have provided no *Gunwall* analysis in support of an expansion of the right from the individual to the closely-held corporation. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). While true, *Burwell* states that the "lawful purpose" which a corporation can pursue under a state's incorporation statues includes "pursuit of profit in conformity with the owners' religious principles." *Burwell*, 134 S. Ct. at 2772. Like Hobby Lobby, Arlene's Flowers is clearly a closely-held corporation. Elane Photography, decided before *Burwell*, assumed without deciding that the corporation could exercise first amendment rights. *Elane Photography*, 309 P.3d at 73.

[29] The Court in *Backlund* applies both State and Federal Constitutional protections of free exercise in the same manner, noting in a footnote that the parties did not argue persuasively for different applications, hence the reference to the First Amendment. *See Backlund*, 106 Wn.2d at 639, FN 3. Here, the parties have persuasively argued for different applications, starting with *City of Woodinville*, 166 Wn.2d at 642 (Article I, Section 11 provides "broader protection than the first amendment to the federal constitution").

discrimination in public accommodations is well settled. *Rotary*, 481 U.S. at 549 (finding this to be "compelling interest of the highest order.") (internal quotation and citation omitted). The Supreme Court stated over thirty years ago:

> acts of invidious discrimination in the distribution of publicly available goods, services and other advantages causes unique evils that government has a compelling interest to prevent.

Roberts v. U.S. Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984). The Court found that public accommodation laws protect a state's citizens from "a number of serious social and person harms," and characterized the injuries flowing therefrom as "stigmatizing." *Roberts*, 468 U.S. at 625; *see also Heckler v. Mathews*, 465 U.S.728, 739-40, 104 S. Ct. 1387, 79 L. Ed.2d 646 (1984)(discussing stigmatizing injury as casting disfavored group as "innately inferior.") The language is consistent with that of *Rotary* and *Burwell*, describing the goal of public accommodation laws seeking to eradicate discrimination as "plainly serv[ing] compelling interests of the highest order." *Roberts*, 468 U.S. at 628. The WLAD, which gives rise to its own claim, and the *per se* CPA claims here at issue, meets this test as well:

> [t]his court has held that the purpose of the WLAD – to deter and eradicate discrimination in Washington – is a policy of the highest order.

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

All of the above cases, save *Burwell*, precede both the 2006 amendment to the WLAD adding sexual orientation as a protected class and Referendum Measure 74 in 2012 approving same-sex marriage. That said, the Court concludes there is no compelling legal argument for a different result for the Legislature's decision to include the protected class of sexual orientation. The Supreme Court struck down a state's attempt to remove protections from discrimination based on sexual orientation as violating equal protection almost 20 years ago. *Romer v. Evans*, 517 U.S. 620, 629, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996) ("Amendment 2 bars homosexuals from

securing protections against the injuries that these public accommodations laws address."). *Elane Photography*, the only other case to squarely address this fact pattern, held, "when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct [such as marriage] that is inextricably tied to sexual orientation." *Elane Photography*, 309 P.3d at 62. The case reached this result under a cognate New Mexico anti-discrimination law, which, as indicated above, is not meaningfully different than the WLAD.

The purpose statement of the WLAD invokes the police power of the state when it declares the law's purpose is to "protect the public welfare, health and peace of the people of this state," and further declares that discrimination, including discrimination based on sexual orientation "threatens not only the rights and proper privileges of its inhabitants, but menaces the institutions and foundations of a free democratic state." RCW 49.60.010. Free exercise expressly excludes "practices inconsistent with the peace and safety of the state." Wash. Const. Article 1, Section 11. In light of these legislative findings, "there is no realistic or sensible less restrictive means" to end discrimination in public accommodations than prohibiting the discrimination itself, the Court should not substitute "[its] judgment for that of the [L]egislature with respect to the necessity of these constraints."[30] *Balzer*, 91 Wn.App. at 65, 60-61 (*citing Smith*, 93 Wn.2d at 338).

The Defendants claim that the WLAD is not narrowly tailored because the State could achieve its goals in other ways. Defendants propose an approach to the issue of discrimination, where business would be allowed to deny goods and services on the basis of the sexual orientation, and such businesses would simply refer that person to a non-discriminating business. This rule would, of course, defeat the purpose of combatting discrimination, and would allow discrimination in public accommodations

[30] The parties do not agree on the scope of the problem of discrimination historically suffered by individuals as the result of sexual orientation. But as *Blazer* makes clear, this is an issue for the Legislative Branch.

based on all protected classes, including race, and thereby defeat the rule of *Heart of Atlanta Motel*, which applied the Civil Rights Act of 1964 to public accommodations under the Commerce Clause. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L. Ed.2d 258 (1964). Because the Court is not to determine the reasonableness of religious belief under *Backlund*, under Defendants' argument the "Curse of Canaan" would stand as equal justification[31] for racial discrimination as does Stutzman's adherence to the Resolutions of the SBC as a basis for refusing service to Ingersoll and Freed. The Defendants during argument asked the Court not to simply accept the "slippery slope" argument. But Defendants' own expert admits that their proposal allows for religiously based racial discrimination in public accommodations. Even without this admission, there is no slope, much less a slippery one, where "race" and "sexual orientation" are in the same sentence of the statute, separated by only by three terms: "creed, color, national origin…". RCW 49.60.215. As the Court in *Elane Photography* observed:

> [s]uch an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.

Elane Photography, 309 P.3d at 72. The WLAD is narrowly tailored to achieve its goals.

b. *Free Speech*

The Washington State Constitution provides as follows:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

[31] The Court intends no disrespect and does not mean to imply either that Stutzman possesses any racial animus, or that she has conducted herself in any way inconsistently with Resolutions of the SBC's direction to condemn "any form of gay-bashing, disrespectful attitudes, hateful rhetoric, or hate-incited actions" toward gay men or women.

Wash. Const. Article 1, Section 5. While the Federal and State Free Speech rights may be different in their scope, the party wishing to argue for greater protection under Article 1, Section 5 needs to make that case. *Bradburn v. North Central Regional Library District*, 168 Wn.2d 789 (2010). While it may be true that greater protection is available under the Washington State Constitution in some instance, "no greater protection is afforded to obscenity, speech in non-public forums, commercial speech, and false or defamatory statements." *Bradburn*, 168 Wn.2d at 800. Defendants have brought forward no argument as to why the result here should not be the same as that under the First Amendment, and thus the Court makes the same ruling.

The AG and the Individual Plaintiffs are correct: no Court has ever held that religiously motivated conduct, expressive or otherwise, trumps state discrimination law in public accommodations. The Defendants have provided no legal authority[32] why it should. The Defendants' affirmative defense fails as a matter of law.

4. Violation of Equal Protection By Selective Enforcement of CPA And WLAD Upon Defendants' Conduct

In the AG's action only, the Defendants assert an affirmative defense as follows:

> 6.8 Selective Enforcement in Violation of the Fourteenth Amendment to the United States Constitution.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.8. In a criminal context, a claim of selective prosecution "asks a court to exercise judicial power over a 'special province' of the executive." *United States v. Armstrong*, 517 U.S. 456, 464,

[32] All of the parties have cited to various administrative decisions addressing similar fact patterns, including the AG and Individual Plaintiffs' after-argument submission on February 12, 2015, of *In Re Klein (d/b/a Sweetcakes)*, OR Bureau of Labor and Industries, Case Nos. 44-14 and 45-14 (Interim Order – Respondents' Refiled Motion for Summary Judgment and Agency's Cross Motion for Summary Judgment, January 29, 2015 (available at http:/www.oregon.gov/boli/SiteAccess/pages/press/BOLI%20Sweet%20Cakes%20In). Rather than listing all such decisions cited by the parties, the Court would simply observe that those administrative agencies passing upon the merits of the claims ruled that violations of the applicable anti-discrimination laws had occurred and did not violate the rights of the business owner.

116 S. Ct. 1480, 134 L. Ed.2d 687 (1996) (*quoting Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985)). The AG, by citing to this authority, asserts same is true here, where the AG is authorized to act in the name of the people in a civil context to prevent conduct. RCW 19.86.080(1) (AG authority to act under the CPA). Defendants do not assert otherwise in their response. A strong presumption of regularity supports the AG's actions and "in the absence of clear evidence to the contrary, courts presume that [the AG has] properly discharged [his or her] official duties." *Armstrong*, 517 U.S. at 464 (further quotation omitted).

Such a due process violation requires a defendant to show "discriminatory effect and discriminatory purpose." *State v. Terrovonia*, 64 Wn.App. 417, 423, 824 P.2d 537 (1992) (defendant did not show prima facie evidence of unconstitutional selective or vindictive prosecution in for unlawful possession of marijuana by a prisoner). Specifically, for selective prosecution, a defendant must show "(1) disparate treatment, *i.e.*, failure to prosecute those similarly situated, and (2) improper motivation for the prosecution." *Terrovonia*, 64 Wn.App. at 422 (*quoting Wayte v. United States*, 470 U.S. 598, 602-03, 105 S. Ct. 1524, 84 L. Ed.2d 547 (1985) (emphasis in original)). Improper motive means "selection deliberately based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (*quoting State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)). The Defendants simply cannot meet this demanding standard. The first burden they face is that, at the time of the filing of this action, the fact pattern was novel: same-sex marriage had only been the law, and thus part of the "bundle of rights" that related to sexual orientation, for approximately 4 months as of March 1, 2014. It is by definition difficult to make a selective prosecution argument when you allege that you are the "test case" for the application of new law. Someone is always first and "selectivity" in itself is not a constitutional violation: it is part of the AG's discretion to choose

when to act. *See, e.g., Terrovonia*, 64 Wn.App. at 422 (*quoting Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed.2d 446 (1962)). As to improper motive for selection, it would defeat the very purpose of statutes aimed at combatting discrimination if the motivation behind alleged discriminatory act supported a selective prosecution claim. Everyone against whom the AG institutes an action is "selected" in some sense, but here no legally improper motive has been shown.

Defendants assert throughout their briefing that they are only here because a then newly-elected Attorney General saw an opportunity to make an example out of Stutzman and Arlene's Flowers by pursuing this action. This is a political question, not a question of fact material to the issue of selective prosecution. Therefore, the Court finds that the Defendants' affirmative defense fails as a matter of law, and that the AG is entitled to summary judgment.

5. Application of Defense of Justification To Claims Under CPA And WLAD As Applied To Defendants' Conduct

In both actions, Defendants assert an affirmative defense titled "Justification." The content is, however, quite different between them. In the Answer to the AG's action, the affirmative defense is listed as follow:

> 6.9 Justification.

Defendants' Answer (13-2-00871-5) (*AG Action*), pg. 6, para. 6.9. In the Individual Plaintiff's action, additional context is provided:

> 33. Justification: As applied violation of Article I Section 11 and Article 1, Section 5 of the Washington State Constitution.

Defendants' Answer (13-2-00953-3) (Individual Action), pg. 6, para. 33. As the AG correctly observes with respect to the proffered affirmative defense in its action, the defense of justification is a general term limited to criminal prosecutions, containing within it the three justification defenses of self-defense, duress, and necessity. *See*

e.g., State v. Turner, 167 Wn.App. 871, 881, 275 P.2d 356 (2012) (self-defense); *see also, State v. Healy*, 157 Wn.App. 502, 513, 237 P.3d 360 (2010) (duress); *State v. Gallegos*, 73 Wn.App. 644, 650, 871 P.2d 621 (1994) (necessity). In response, Defendants do not provide any authority that the defense of necessity bas any application in a civil context. Given the Defendants' affirmative defense in the individual action, where Defendants are represented by the same counsel, it appears that, by justification, Defendants mean that their actions are justified by the listed sections of the Washington State Constitution. Therefore, the Court finds that the Defendants' affirmative defenses in both actions fail as a matter of law, and that the AG and Individual Plaintiffs are entitled to summary judgment because either: 1) Justification is not an available defense in a civil action; or 2) as applied to Defendant's conduct, this these actions do not violate either Article I, Sections 11 or 5 of the Washington State Constitution, as indicated above.

6. Four Remaining Non-Constitutional Defenses In Individual WLAD And CPA Actions

Many of the affirmative defenses plcd by Defendants were raised in both actions, using substantially similar language. These actions having been consolidated for pre-trial motion practice, both Individual Plaintiffs and the AG are entitled to the benefit of rulings. While not specifically addressed by the parties, both parties in the Individual WLAD and CPA claims appeared to assume the remainder of the Defendants' affirmative defenses arc rcsolvcd by the Court's rulings in these and prior summary judgmcnt motions by the parties. For a total of four of these affirmative defenses, it was not absolutely clear to the Court as to whether tbis is the case. (*Defendants' Answer* (13-2-00953-3), pg. 6, paras. 34-37) (listing affirmativc defenses of Failure to Mitigate Damages, Estoppel, Waivcr and Ratification, and Lack of

Standing in regard to Curt Freed). Therefore, the Court called for additional briefing from Defendants and the Individual Plaintiffs. Both parties have responded.

The Individual Plaintiffs in their briefing agree that neither party addressed either of the four remaining affirmative defense in motion practice to date. They argue, by analogy to Federal Civil Rule 56, and case law interpreting it, that by moving for summary judgment on liability, affirmative defenses not specifically asserted by the Defendants are thereby abandoned. Thus, as to the three affirmative defenses not relating to a determination of damages ("Failure to Mitigate Damages") the Individual Plaintiffs assert that they are entitled to summary judgment. *United States v. Mottolo*, 26 F.3d 261, 263 (1st Cir. 1994) (*citing United Mine Workers of America 1974 Pension v. Pittson Co.*, 984 F.2d 469, 478 (D.C. Cir. 1993)); *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076 (D. Del. 1990), *affirmed by*, 932 F.2d 959 (3rd Cir. 1991). Both parties agree that the affirmative defense of "Failure to Mitigate Damages," is not before the Court, because the case has not yet reached the damages phase. The Court agrees as well, and will not address it. While the Individual Plaintiffs make a compelling analogy to the federal rule, the Court will nonetheless address the remaining three affirmative defenses on the merits.

a. Estoppel

The affirmative defense includes additional explanation:

35. Estoppel: Plaintiff's [sic] actions and omissions negate the relief requested. (*Defendants' Answer* (13-2-00953-3), pg. 6, para. 35). Defendants cite to an unpublished case, which this Court may not consider. *City of Cheney v. Bogle*, 144 Wn.App. 1022 (2008) (*unpublished*). The Individual Plaintiffs correctly list the elements of equitable estoppel: (1) an admission, statement, or act inconsistent with the claims afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing

the first party to contradict or repudiate such admission, statement, or act. *Dobrosky v. Farmers Insurance Company of Washington*, 84 Wn.App. 245, 256, 928 P.2d 1127 (1996). Defendants' argument, without supporting authority, seems to be that because Stutzman was often asked to design arrangements for Ingersoll, Ingersoll had an obligation to commit to asking for only "sticks and twigs" at the outset of the request for goods and services and communicate tbat specifically up front, to prevent Stutzman from discriminating against him. The Court believes that in this fact pattern, the Individual Plaintiffs' understanding of collateral estoppel, that it would address the consequences of an action taken by Ingersoll or Freed after tbe refusal by Stutzman, is the more reasonable interpretation. The Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

b. Waiver and Ratification

The affirmative defense is pled as it is in the caption above:

36. Waiver and Ratification.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 36). The Defendants state they "no longer pursue this defense." Because it is in fact abandoned, the Court grants summary judgment in favor of the Individual Plaintiffs.

c. Lack Of Standing In Regard To Plaintiff Curt Freed

The affirmative defense is again pled as it is in the caption above:

37. Lack of Standing in regard to Plaintiff Curt Freed.

(*Defendants' Answer* (13-2-00953-3), pg. 6, para. 37). Defendants confirm that their arguments here are tbose they made ahove: 1) that the case is the result of a misunderstanding, and thus the refusal by Stutzman should be discarded in favor of

what she might have done had she not immediately refused to provide services for Ingersoll and Freed's wedding, and 2) that Ingersoll and Freed are now married, and thus the case is moot. For the reasons listed above in the Court's discussion of Defendants' Motion For Summary Judgment Based On Plaintiffs' Lack Of Standing, the Court finds this affirmative defense fails as a matter of law, and grants summary judgment in favor of the Individual Plaintiffs.

V. CONCLUSION

On the evening of November 5, 2012, there was no conflict between the WLAD or the CPA and the tenets of Barronelle Stutzman's Southern Baptist tradition. The following evening, after the passage of Referendum 74, confirming the enactment of same-sex marriage, there would eventually be a direct and insoluble conflict between Stutzman's religiously motivated conduct and the laws of the State of Washington. Stutzman cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-licensed business, Arlene's Flowers. While the percentage of her business at issue is small, approximately three percent, the AG and the Individual Plaintiffs do not gainsay the fact of her religious convictions in relation to these activities. The Defendants argue that these causes of action on behalf of the Individual Plaintiffs and the AG are novel and improper abridgements of their right to free exercise of religion.

For over 135 years, the Supreme Court of the United States has held that laws may prohibit religiously motivated action, as opposed to belief. In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the Courts have confirmed the power of the Legislative Branch to prohibit conduct it deems discriminatory, even where the motivation for that conduct is grounded in religious belief. The Washington Legislature properly invoked the

police power of the State in drafting the WLAD, a violation of which is a *per se* violation of CPA in trade or commerce. Article I, Section 11 of the Washington State Constitution expressly states that religiously motivated conduct is limited by the police power of the state. In so doing, the Legislature drafted a law that does not violate either the United States Constitution or the Washington State Constitution. Ingersoll and Freed and the AG are entitled to rely upon these laws passed by the Legislature of the State of Washington, and confirmed through the vote of its citizens, to bring their actions against the Defendants.

The Individual Plaintiffs and the AG have standing to bring their actions based on the past actions of the Defendants and the potential for future violations. Defendants remaining affirmative defenses fail as a matter of law, and their admitted conduct establishes their liability under the WLAD and CPA as a matter of law. The Individual Plaintiffs and the AG are therefore entitled to summary judgment on their claims to the extent they have requested.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants' Motion For Summary Judgment Based On Plaintiff's Lack Of Standing is **DENIED**.
2. Plaintiff State Of Washington's Motion For Partial Summary Judgment On Liability And Constitutional Defenses is **GRANTED**.
3. Plaintiffs Ingersoll And Freed's Motion For Partial Summary Judgment is **GRANTED**.
4. Summary Judgment in the remaining Non-Constitutional Defenses in the Individual WLAD and CPA actions are **GRANTED IN FAVOR OF PLAINTIFFS INGERSOLL AND FREED**, with the exception of the Affirmative Defense of Failure to Mitigate Damages, upon which **RULING IS DEFERRED**.

IT IS SO ORDERED.

DATED this 18th day of February, 2015.

ALEXANDER C. EKSTROM
Benton County Superior Court Judge